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WM. R. STA

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1924.

**Nos. 103, 327.**

ALPHA PORTLAND CEMENT COMPANY,
*Plaintiff-in-Error,*
v.
COMMONWEALTH OF MASSACHUSETTS,
*Defendant-in-Error.*

IN ERROR TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

## BRIEF FOR AMERICAN SALES BOOK COMPANY, LTD., AND SHREDDED WHEAT COMPANY, AS FRIENDS OF THE COURT, FILED BY LEAVE.

BASIL ROBILLARD,
*Counsel for Amici Curiae.*

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

In The

# Supreme Court of the United States

October Term, 1924.

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| Alpha Portland Cement Company, *Plaintiff-in-Error,* v. Commonwealth of Massachusetts, *Defendant-in-Error.* | Nos. 103, 327. |

PLEASE TAKE NOTICE, that upon the annexed petition and brief the undersigned as counsel for American Sales Book Company, Ltd., and The Shredded Wheat Company will apply to the Supreme Court of the United States at Washington, D. C., at the next motion day thereof, October 21st, 1924, at the opening of Court on that day, or as soon thereafter as counsel can be heard, for leave to intervene herein as friends of the Court and to file the accompanying brief.

BASIL ROBILLARD,
*Counsel for American Sales Book Company, Ltd., and The Shredded Wheat Company, as friends of the Court in this cause,*
Office and P. O. Address,
425-443 Gluck Building,
Niagara Falls, N. Y.

To

Mr. Louis H. Porter,
*Counsel for Plaintiff-in-Error,*
*The Attorney General of Massachusetts,*
*Counsel for Defendant-in-Error.*

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1924.

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| ALPHA PORTLAND CEMENT COMPANY, *Plaintiff-in-Error,* v. COMMONWEALTH OF MASSACHUSETTS, *Defendant-in-Error.* | Nos. 103, 327. |

The petition of American Sales Book Company, Ltd., a corporation of Ontario, doing business in the State of New York, and of Shredded Wheat Company, a corporation of New York, doing business in that State, respectfully shows to the Court:

1. That your petitioners are engaged in interstate commerce into and in the Commonwealth of Massachusetts, and neither of your petitioners

do any business wholly within the Commonwealth of Massachusetts.

2. That excise taxes similar to those assessed upon the plaintiff-in-error in this cause have been assessed against your petitioners for the years 1920, 1921, 1922, 1923 and 1924; that your petitioners have duly protested against said taxes and appealed therefrom. Protests and said appeals were denied by the Tax Authorities of Massachusetts. Petitioners are now preparing proceedings before the Supreme Judicial Court of Massachusetts, pursuant to the Statute under which said taxes were assessed, for review of the same, all preliminary to presenting to this Court questions arising under the third clause of the eighth section of Article I of the Constitution of the United States, and questions arising under the Fourteenth Amendment to the Constitution of the United States in reference thereto also raised before said Tax Authorities of Massachusetts.

3. That your petitioners are situated similarly to the plaintiff-in-error above named with the exception that against your petitioner, American Sales Book Company, Ltd., a proceeding for injunction under Section 75 of the statute under which said taxes were assessed was commenced by the Attorney General of Massachusetts on the relation of the Commissioner of Corporations and Taxation to restrain said petitioner from further doing business within the Commonwealth of Massachusetts until said taxes were paid, and

with the exception that the Commonwealth of Massachusetts, through its taxing authorities, has each year assessed upon all the property of your petitioner, Shredded Wheat Company, in the Commonwealth of Massachusetts property taxes which have been duly paid.

4. That your petitioners, being in a such similar situation to the plaintiff-in-error, are desirous of laying before this Court a short brief duplicating as little as possible the brief of the attorneys for the plaintiff-in-error, setting forth the situation of your petitioners and the applications of the law to cases such as theirs.

WHEREFORE, your petitioners pray leave to intervene herein as friends of the Court and to file the annexed brief.

All of which is respectfully submitted,

AMERICAN SALES BOOK COMPANY, LTD.,

THE SHREDDED WHEAT COMPANY,
By Basil Robillard,
*Their Counsel.*

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1924.

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| ALPHA PORTLAND CEMENT COMPANY, *Plaintiff-in-Error,* v. COMMONWEALTH OF MASSACHUSETTS, *Defendant-in-Error.* | Nos. 103, 327. |

In error to the Supreme Judicial Court of Massachusetts.

## BRIEF FOR AMERICAN SALES BOOK COMPANY, LTD., and SHREDDED WHEAT COMPANY, as Friends of the Court, Filed by Leave.

By leave, American Sales Book Company, Ltd., and Shredded Wheat Company file this brief as friends of the Court. Duplication of the brief for the plaintiff-in-error will be avoided so far as possible.

### Status of These Parties.

American Sales Book Company, Ltd., is a corporation of the Province of Ontario, manufacturing merchandise at Elmira, New York, and Niag-

ara Falls, New York, and selling it in interstate commerce. Shredded Wheat Company is a corporation of New York, manufacturing food in Niagara Falls, N. Y., and selling it in interstate commerce. Both companies have rented offices in Boston, Massachusetts, which are headquarters for salesmen travelling in various parts of New England, taking orders which are sent to the respective home offices in New York State for acceptance or rejection. The merchandise to fill these orders is shipped direct to purchasers in interstate commerce. Neither company maintains a stock of goods in Massachusetts, or delivers or ships any property from point to point within Massachusetts, or out of Massachusetts. Collections of accounts are made by mail from the factories of each in New York State. The only property that either company has in Massachusetts consists of the equipment of the Boston office,—$872 in value in the case of American Salesbook Company, Ltd., and $4500 in the case of Shredded Wheat Company.

Shredded Wheat Company has received and paid annual assessments of property tax upon its personal property in Massachusetts, aside from the excises assessed against it under Chapter 63 of the General Laws, which are here in question.

These latter excises upon these parties follow:

American Salesbook Company, Ltd.

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|---|---|
| 1920.. | $277.01 |
| 1921... | 312.32 |

| | | |
|---|---|---|
| | 1922.. | 333.37 |
| | 1923.. | 483.72 |
| | 1924.. | 776.58 |
| Shredded Wheat Company, | 1921.. | $1,477.40 |
| | 1922.. | 3,573.23 |
| | 1923.. | 3,213.91 |
| | 1924.. | 2,071.92 |

Proceedings for review thereof have been completed in the Tax Department as provided by the statute, except as to the 1924, proceedings for review of these being now in the Department. All of these excises except those for 1924 have been paid under protest, and are the subject of petitions for review under the statute in the Supreme Judicial Court of Massachusetts. The protests and appeals filed and refused in the Tax Department, and the petitions for review all raise specifically the issues here contended for by the plaintiff-in-error and those referred to in this brief.

**Payment of these excises is made a condition precedent to the conduct of interstate commerce with inhabitants of Massachusetts and the excises are, therefore, void.**

We invite attention to Section 75 of Chapter 63 of the General Laws of Massachusetts, providing for the collection of these excises.

> "Section 75. In addition to the methods provided by sections seventy-two and seventy-three, taxes under this chapter, except section sixty-two, may be collected by an

information brought in the Supreme Judicial Court by the Attorney General at the relation of the Commissioner. The Court may issue an injunction, restraining the further prosecution of the business of the company, association or corporation until such taxes, with interest and costs thereon, have been paid; but no telegraph company accepting the provisions of section fifty-two hundred and sixty-three of the Revised Statutes of the United States shall be enjoined from constructing, maintaining or operating a telegraph line over and along any of the military or post roads of the United States within this commonwealth."

Under this section, the Attorney General of Massachusetts, at the relation of Henry F. Long, Commissioner of Corporations and Taxation, brought an information in the Supreme Judicial Court under No. 38364, entitled:

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

| | |
|---|---|
| JAY R. BENTON, Attorney General at the relation of HENRY F. LONG, Commissioner of Corporations and Taxation,<br>v.<br>AMERICAN SALES BOOK CO., LTD. | No. 38364.<br>In the Supreme Judicial Court of the State of Massachusetts, sitting in and for the County of Suffolk, in said State. |

This information, reciting the non-payment of the excise tax for 1922, under Chapter 63 of the General Laws, sought relief as follows:

> "WHEREFORE, your informant prays a decree that said sum is due the Commonwealth from said corporation, as its tax aforesaid, and that the same be paid, with interest as aforesaid, and costs, and that a writ of injunction issue, restraining the further prosecution of the business of said corporation until said sums are fully paid, and for such other relief in the premises as justice may require."

That cause was removed to the District Court of the United States for the District of Massachusetts, and placed upon its calendar under No. 1843. A copy of the information as certified by the Clerk of the Supreme Judicial Court of Massachusetts under its seal is annexed to this brief.

The payment of these excises is therefore an obvious condition precedent to the conduct of business in Massachusetts. American Salesbook Company, Ltd., has always conducted its business with the inhabitants of Massachusetts as above described, in pure interstate commerce. The Commonwealth under Section 75 has sought to stop the conduct of that business by an injunction "restraining the further prosecution of the business of said corporation until said sums are fully paid". The continuance of interstate commerce being conditioned upon the payment of this state excise, the excise is void as an unconstitutional attempt to regulate interstate commerce, contrary to Section 8 of Article I of the United States Constitution, and contrary to the Fourteenth Amendment thereto.

*LeLoup vs. Port of Mobile*, 127 U. S. 640.
*Postal Telegraph Co. vs. Adams*, 155 U. S. 688.

Approved in:
*Atlantic & Pacific vs. Philadelphia*, 190 U. S. 160.
*Underwood Typewriter Co. vs. Chamberlain*, 254 U. S. 113.

As its enforcement was sought, the section should not be disregarded.

*St. Louis, &c., R. R. Co. vs. Arkansas*, 235 U. S. 350.

The Court below evidently recognized that such a provision would invalidate the statute (Record, p. 29); and it does invalidate it.

*Looney vs. Crane Co.*, 245 U. S. 135.
*International Textbook Co. vs. Pigg*, 217 U. S. 91.

**The scheme of the excise on foreign corporations is beyond the jurisdiction of Massachusetts and the excise is void.**

The excise is two-fold. It consists of a tax on "Income Assignable to Massachusetts" and a tax on "The Corporate Excess employed * * * * in Massachusetts" (Sec. 39 Record p. 37). Examination of the statutory definition of the subjects of taxation proves the tax on foreign corporations beyond the jurisdiction of the Commonwealth.

Section 41 of the Statute (p. 37), by reference to Section 38 (p. 35), defines the taxable income. It is the total income of the corporation apportioned in three parts. One-third is proportioned in the ratio of tangible assets in Massachusetts to those outside. This may be valid. Another third is proportioned in the ratio between wages paid to employees "not chiefly situated at, connected with or set out from premises * * outside the Commonwealth" (Section 37 Sub. 5 p. 36) and all wages paid. This is based upon the location of the office and not the location of the rendition of services and has no possible relationship to income from Massachusetts. The final third is proportioned in the ratio between gross receipts from all sales, except those negotiated by agents "situated at, connected with or sent out from premises * * outside the Commonwealth" (Section 37 Sub. 6 p. 36). Again, the location of the office and not the location of the sales or the purchaser is the determining factor and the result has no possible relationship to income from Massachusetts.

Applying this scheme to these companies for example, we find : They conduct interstate business throughout New England by salesmen connected with a Boston office. They are required to pay tax upon an "assigned income" computed on the salaries paid to New England salesmen (not Massachusetts salesmen only) and upon gross sales in New England (not Massachusetts only), upon the pretext that the test

is that these salesmen are not connected with any other than the Boston office. Under the statute, if the New England salesmen were connected with no office, situated at no office and sent out from no office, but working independently in a territory outside Massachusetts the tax would still be computed thus upon that business. The situation of the office and not the place of the agent's activity; the situation of the office and not the source of the income, these are the criteria. The office location has not any relation to the income from Massachusetts, which is fixed by the residence of the customers. The tax is upon income from New England, or which can only be apportioned under the scheme to the whole of New England, and is therefore upon subjects beyond the territory of Massachusetts, and outside its jurisdiction. The tax on income as assigned and fixed is, therefore void.

The state computation of corporate excess for tax purposes is similarly fallacious. The opinion below in Case No. 327 recites and approves as a proper interpretation of the statute Order No. 2505 of the Commissioner of Taxation. This order assigns to Massachusetts as taxable corporate excess the value of all tangibles therein (with immaterial exceptions) plus that proportion of the value of all intangibles wherever located which "that portion of the remainder of income allocable in Massachusetts under the provisions of Section 19 of the act bears to the total of said

remainder," The income allocation, as shown, is based upon activities and sales throughout New England. The corporate excess is also thus allocated arbitrarily upon the same agents' activities and sales. That bank deposits patents or even goodwill should be thus allocated is an apparent unjustified assumption of jurisdiction. Accounts receivable certainly cannot thus be legally brought into Massachusetts for taxation. They follow the residence of the debtor. The attempt to seize a large proportion of them for taxation is clearly unjustified.

Conceding the propriety of an arbitrary allocation such as this, the basis of it here cannot be sustained. It does not accord with fairness or reasonableness. Neither does it nor can it, correspond at all to the value of any assets actually or potentially within the Commonwealth.

The court below in its opinion at page 25 of the Record would justify the tax as an excise "for the privilege of having a place of business under the protection of our laws, and with the financial, commercial and other advantages flowing therefrom, measured solely by the property and net income fairly attributable to the business done here." However the business done is also under the protection in part of every other state of New England, and receives its advantages. The income designated attributable to Massachusetts in fact can be attributed only to it in part, and the

remainder must be attributed to those other states which are the source thereof. Likewise in the present cases the corporate excess made up almost entirely of intangibles assigned to Massachusetts, if attributable at all, upon the present scheme must be attributable in large part to the other New England states and cannot all be taxed in Massachusetts. The attempt to do so is beyond the jurisdiction of that Commonwealth.

The arbitrary nature of the allocation vitiates the tax.

*Union Tank Co. vs. Wright,* 249 U. S. 275, 282.

*Postal Telegraph Co. vs. Adams,* 155 U. S. 688, 695.

The location of the Boston office is no proper basis for allocation of income or intangible property.

*Cheney Bros. vs. Massachusetts,* 246 U. S. 153, 154.

The tax being based upon property outside the state, and not allocable to the state, or not properly allocated there, is void.

*Looney vs. Crane Co.,* 245 U. S. 178.

*Meyers vs. Wells, Fargo & Co.,* 223 U. S. 290.

**The property of Shredded Wheat Company, once taxed, cannot be the basis of this as a property tax.**

Attention has been called to the property tax levied and paid upon the assets of Shredded Wheat Company in Massachusetts annually. The court below would sustain this excise partly upon the ground that plaintiff-in-error "has a small amount of personal property permanently within the commonwealth upon which it pays no tax except by way of this factor of the excise," evidently referring to the distinction in *St. Louis R. Co. vs. Arkansas,* 235 U. S., 350, at page 367. Even if its decision were to be sustained, we submit that such cases should be distinguished.

## Inaccuracies of Fact Below.

Plaintiff-in-error was unsuccessful below largely because the Court misinterpreted several very pertinent facts which an examination of the entire record will clearly indicate:

> "The value of the corporate excess employed in the Commonwealth as a factor of the tax is not measured by the capital stock of the corporation." (Opinion, Record, p. 25).

Vide Record, p. 13, Table I, which indicates that the capital stock valuation where obtainable is a material factor.

In the case of these two corporations it was obtainable and used for valuation of corporate excess by the Department.

> "It is measured by the value of the property employed in the Commonwealth." (Record, p. 25).

We have shown that the measure has nothing to do with employment within the Commonwealth, but is rather based upon an arbitrary assignment to employment in New England.

> "The tax, as measured by the net income from business transacted in Massachusetts as a factor, etc." (Record, p. 27).

The business is transacted in New England in large part in these cases.

> "The tax upon the petitioner in substance and effect, so far as concerns the factor of its corporate excess employed within the Commonwealth, is levied upon its tangible personal property within the Commonwealth, upon credits due it from debtors within this Commonwealth and upon the exercise of its franchise within this Commonwealth, and so far as concerns the factor of its income, upon the net income derived from business within this Commonwealth, after all losses and expenses have been paid. It is not directed against interstate commerce or property outside the state, but is confined to business done, property located, capital employed and net income earned within the Commonwealth." (Record, p. 29).

We submit that to so hold is to ignore the facts that the business is done throughout New Eng-

land, the capital employed there, the income earned there; and that even accounts receivable outside the state are brought in for tax, the credits referred to springing in fact throughout the country, and if allocable, are only allocated to New England.

> "The aim of this statute in this particular is to reach only profits earned within the state." (Record, p. 30).

It is also implied (Record, p. 25) that the right to continue interstate business was not dependent upon the payment of the tax. The proceedings against American Salesbook Company, Ltd., under Section 75 (omitted from the Record but set forth above) demonstrate the inaccuracy of any such inference.

## Suggestions of the Intervenors.

It is respectfully suggested to the Court that the excise is invalid under the Commerce Clause and the Fourteenth Amendment:

1. As a condition precedent to the transaction of interstate commerce under Section 75 of the act.

2. As a tax upon property beyond the jurisdiction of the Commonwealth, not allocable to its jurisdiction.

3. As based upon a grossly improper and invalid allocation, arbitrarily made upon the loca-

tion of an office, and not upon either business, income or property location.

It is further respectfully suggested that if upon this record this Court feels obliged to affirm, that cases in which threatened actual restraint of commerce, or the payment of another personal property tax shall appear be distinguished, or not decided by implication.

Respectfully submitted,

BASIL ROBILLARD,
*Counsel for Intervenors.*

# APPENDIX.

## THE COMMONWEALTH OF MASSACHUSETTS.

*To the Supreme Judicial Court:*

JAY R. BENTON, Attorney-General, at the relation of Henry F. Long, Commissioner of Corporations and Taxation, for and on behalf of the Commonwealth informs the court that the American Sales Book Co., Ltd. has been since a time prior to the first day of April, 1920, and is now a corporation organized by law for purposes of business or profit, subject to the provisions of General Laws, chapter 63, and acts in amendment thereof and in addition thereto, and is liable to a tax upon its net income and corporate excess in accordance with the provisions of said chapter 63; that on the 21st day of May, 1922, in accordance with the law, the commissioner of corporations and taxation of the Commonwealth duly ascertained and assessed the amount of the tax payable by said corporation to the Commonwealth, in and for said year, at the sum of four thousand one hundred eighty-seven 96/100 dollars; that the commissioner of corporations and taxation on the 21st day of May gave notice, in accordance with law, to the treasurer of said corporation of the amount of said tax and that it would be due and payable to said Commissioner of Corporations and Taxation by said corporation, within thirty days after the date of said notice, but not before the twen-

tieth day of June, 1922, and that within thirty days after the date of such notice said corporation might apply for a correction of said tax.

And your informant says that by virtue of law and said proceedings, said corporation became liable and was bound to pay said tax to said Commissioner of Corporations and taxation within thirty days after the date of said notice, but that said corporation has not paid said tax, or any portion thereof, and has unlawfully neglected and omitted to pay the same and still owes the same to the Commonwealth, with interest thereon at the rate of twelve per cent per annum from the date when said tax became due and payable.

WHEREFORE, your informant prays a decree that said sum is due the Commonwealth from said corporation, as its tax aforesaid, and that the same be paid, with interest as aforesaid, and costs, and that a writ of injunction issue, restraining the further prosecution of the business of said corporation until said sums are fully paid, and for such other relief in the premises as justice may require.

JAY R. BENTON,
*Attorney-General.*

A true Copy,

(Seal).

*Nullivendemus*
*Nullinrgabimus*
*Justitiam*

Attest,
(Signed) JOSEPH RILEY,
*Asst. Clerk.*

July 29, 1923.